INDEX.

Petition for Writ of Certiorari 1

Statement of the Matter Involved 1

Question Presented 2

Reasons for Allowance of the Writ 2

Jurisdiction 3

Prayer for Relief 3

Brief in Support of Petition 5

Assignments of Error 5

Statement of Facts 5

Argument 9

Ohio Law Controls 9

Ohio Law 9

Lower Courts Did Not Follow Ohio Law 13

Myers Case 14

Plaintiff Did Not Comply 15

Opinions Below 16

Conclusion 16

TABLE OF AUTHORITIES.

Cases.

Erie R. R. Co. v. Tompkins, 304 U. S. 64 (1938) 9

Foster v. Scottish Union & National Ins. Co., 101 O. S. 180, 127 N. E. 865 12

Kornhauser, Receiver v. National Surety Co., 114 O. S. 24 (1926) 9, 14

Michigan Automobile Ins. Co. v. Van Buskirk, 115 O. S. 598 (1927) 11, 12, 13, 14

Myers v. Ins. Co., 108 O. S. 175 (1923) 11, 12, 14, 15

Ohio Farmers' Ins. Co. v. Titus, 82 O. S. 161 (1910) ..10, 11 13, 14

Rosenthal v. New York Life Ins. Co., 304 U. S. 263 (1938) 9

Ruhlin v. New York Life Ins. Co., 304 U. S. 202 (1938) . 9

U. S. v. South-Eastern Underwriters Assn., 322 U. S. 533 3

Statutes.

Judicial Code, Title 28, Section 1254 (1) 3

Judicial Code, Title 28, Section 2101 (c) 3

In the Supreme Court of the United States

OCTOBER TERM, A. D. 1949.

No. . . . . .

INSURANCE COMPANY OF NORTH AMERICA,
Petitioner,

vs.

CARL T. HOWE,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, The Chief Justice and the Associate Justices of the United States:

Insurance Company of North America hereby petitions for the issuance of a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit whose judgment of December 14, 1949, affirmed the judgment below.

STATEMENT OF THE MATTER INVOLVED.

This controversy arises from a claim asserted by Carl T. Howe against Insurance Company of North America to recover the proceeds of Horse Livestock Policy No. 1-HL-17953 in the amount of $5,000.00 upon a race horse named Menex. The animal is claimed to have died June 27, 1947, as the result of an accident sustained on the 2nd day of May preceding, while racing at Tanforan Track near San Francisco, California. The insurer denied the claim because of the insured's failure to give immediate telegraphic and written notice of injury to the insurer's head office; his failure to give immediate notice to the insurer of

death of the animal; his failure to submit sworn proof of loss within 30 days, and his further failure to submit, at any time, veterinarian's affidavit on insurer's form, all as required by the policy, and by the applicable law of Ohio in which state the action arose.

QUESTION PRESENTED.

Has a Circuit Court of Appeals properly performed its duty of applying appropriate local law where it holds that, under a policy requiring written notices of injury and death to an insurer's head office, such notices may, in fact, be given orally to a local representative; that obligations to submit proof of loss and veterinarians' affidavits within 30 days are met by filing proof of loss in 45 days without veterinarians' affidavits; where the decisions of the local court of last resort are to the effect that policy conditions must be strictly met?

REASONS FOR ALLOWANCE OF THE WRIT.

The established rule, that Federal Courts must correctly apply local law as decided by State Courts of last resort, has special importance when questions of insurance policy interpretation are involved, since insurance in its many forms is a matter of universal interest. Millions of people have insured their lives, homes, household goods, automobiles, etc. It is a matter of great, general importance to insurers and policyholders alike that the law be clarified by our highest court, regarding policy conditions the violation of which will void the policy. Heretofore, compliance with policy conditions has been required by the courts. Premiums are based upon experience anticipated under the hazards of the policy as written. If provisions regarding notice need not be complied with and the insurer is bound nonetheless upon the occurrence of the ultimate loss, without an opportunity to minimize or avoid

the loss, premiums must necessarily be increased to the prejudice of all policyholders. We believe that the decision of the Court of Appeals on this important question is in conflict with applicable decisions of the Ohio Supreme Court. This Court held in *U. S. v. South-Eastern Underwriters Assn.*, 322 U. S. 533, that insurance business is interstate commerce. Insurance companies generally operate a nationwide business.

JURISDICTION.

The jurisdiction of this Court to grant the Writ is invoked under Judicial Code, Title 28, Section 1254 (1). The judgment of the United States Court of Appeals for the Sixth Circuit was rendered December 14, 1949, and this petition is filed within the statutory period. Judicial Code, Title 28, Section 2101 (c).

PRAYER FOR RELIEF.

WHEREFORE the petitioner, by its counsel, prays the issuance of a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit to the end that the judgment may be reversed and for such other relief as to the Court may seem appropriate.

JAMES A. BUTLER,

Attorney for Petitioner,
Insurance Company of
North America.

In the Supreme Court of the United States

OCTOBER TERM, A. D. 1949.

No. .....

INSURANCE COMPANY OF NORTH AMERICA,
Petitioner,

vs.

CARL T. HOWE,
Respondent.

BRIEF IN SUPPORT OF PETITION.

ASSIGNMENTS OF ERROR.

The Circuit Court of Appeals erred:

1. By departing from the applicable local law as decided by the Ohio Supreme Court, the case being one involving local law;
2. In affirming the judgment of the District Court which was based on an erroneous interpretation of applicable Ohio law and on inadequate proof.

STATEMENT OF FACTS.

The parties will be referred to as they stood in the trial court. Carl T. Howe filed a petition in Cuyahoga County, Ohio, Common Pleas Court against Insurance Company of North America. On the grounds of diversity of citizenship, Insurance Company removed the case to the U. S. District Court for the Northern District of Ohio, Eastern Division. Trial was had in that court resulting in a jury's verdict in favor of the plaintiff for $5,300. Judgment was entered accordingly. The U. S. Court of Appeals for the Sixth Circuit affirmed the judgment of the trial court, by order, without writing an opinion.

Photostatic copy of the policy is contained in the Record, pages 161-166. The policy clearly sets forth on its first page:

"Conditions Avoiding Policy"

These conditions require: immediate notice of illness or injury by telegraph to the head office at 1600 Arch Street, Philadelphia, Pa., and to be confirmed in writing; immediate notice of death to the head office stating date and cause and name of attending veterinarian; submission of sworn proof of loss and veterinarian's affidavit on company forms within 30 days; right to have a post-mortem performed. No officer, agent or other representative of the company has power to waive any condition except in writing attached to the policy.

Defendant, through an agent, Estabrook & Co., wrote the policy upon Menex, owned by the plaintiff. Howe, who is engaged in the dry cleaning business in Cleveland, owned a string of race horses which he sent to tracks all over the United States in charge of George Cummins, a free lance trainer. Howe testified that on May 2, 1947, the trainer phoned him from San Francisco to report that Menex had that day won a race; was injured in the race but not seriously; that he had been looked over by the track veterinarian; and that the trainer expected to take Menex to Portland, Oregon, shortly, for races there (R. 84, 85).

About the 12th or 13th of May, plaintiff went to Portland where he conferred with the trainer and saw Menex who was then under the care of a veterinarian, Dr. Phelps, who lanced Menex' leg (R. 87, 88). About May 25, plaintiff returned to Cleveland. Thereafter, he had no word from the trainer or anyone else about the horse until he received a letter written by the trainer at Vancouver, B. C., on July 5.

The letter reported that Menex died June 27 at a rest farm at Grant's Pass, Oregon. It stated that Menex' suspensory ligament had been cut almost in two and that in-

fection set in from which the animal died (Ex. A, R. 177). Plaintiff admitted that no telegraphic notice and no notice in writing was sent to the head office (R. 86). Plaintiff further admitted that he was familiar with the policy provision requiring telegraphic notice of injury to the head office (R. 87). Plaintiff made oral reports to agent George Estabrook in Cleveland.

Plaintiff's only other witness was Estabrook who testified that about May 5 he orally conveyed the report of injury to Fred Treacy in defendant's service office in Cleveland. He says that he also reported orally to Treacy a telephone call from Howe at Portland to the effect that Menex was improving. On July 7, Howe and Estabrook called on Treacy at the Cleveland service office, orally reported that Menex had died on June 27, and showed Treacy the letter from the trainer, Cummins. The first time names of veterinarians were given to Treacy was on August 18 (R. 90).

Treacy denied having received any reports about Menex in May. He said that the first information that he received was on July 7 when Estabrook and Howe called on him and reported that Menex had died (R. 121). The following day, Treacy wrote to the head office passing on the report given to him by Estabrook and Howe (R. 122 and Ex. B, R. 178).

Estabrook also testified that on October 7, 1947, he called at the defendant's head office in Philadelphia and there conferred with H. J. McCormick, an adjuster; Alonzo L. Tyler, Assistant Marine Loss Manager; and Clinton Bird, Assistant Secretary of the company. All of these head office men testified that the first information they had about Menex was Treacy's letter of July 8, reporting that the horse had died on June 27 (R. 96, 136, 143). They also testified that Treacy had a duty to inform the head office of any information he might receive about Menex.

At their meeting on July 7, Treacy gave Howe the forms which were to be filled in and signed by him as

owner, and the forms for affidavits by veterinarians (R. 78, 79). Howe took the forms. The policy required that these forms be completed and submitted within 30 days after death of the insured animal. On August 18, 45 days after June 27, the date on which Menex is supposed to have died, Howe delivered to Treacy the executed proof of loss blank accompanied by bills and letters from veterinarians (R. 90). No affidavit from any of the veterinarians has ever been submitted to any representative of defendant.

At the trial, plaintiff's evidence consisted only of his own testimony and that of the agent, George Estabrook, supplemented by 11 exhibits. Plaintiff offered no testimony of any witness having personal knowledge that Menex had died, or of the condition or treatment of Menex after May 25.

Defendant moved for judgment after opening statement of plaintiff's counsel (R. 18), and again at the end of plaintiff's evidence (R. 95), on the basis that plaintiff admitted failure to comply with policy conditions regarding notice, and the further ground that plaintiff had offered no admissible proof that Menex had died. The court overruled the first motion and reserved decision on the second one. At the end of all the evidence in the case, defendant renewed its motion for judgment (R. 152). The court then overruled the motion (R. 153).

ARGUMENT.

Ohio Law Controls.

Since the decision of *Erie R. R. Co. v. Tompkins,* 304 U. S. 64 (1938), there have been several decisions of the Supreme Court of the United States holding that federal courts in dealing with questions of general commercial law such as the construction of contracts of insurance are bound to follow the decisions of the appropriate state court. That was announced in *Ruhlin v. New York Life Ins. Co.,* 304 U. S. 202 (1938). See also *Rosenthal v. New York Life Ins. Co.,* 304 U. S. 263 (1938). In the *Rosenthal* case, the Eighth Circuit Court of Appeals decided the questions as matters of general law according to the view of the court as to the weight of authority. Petitioners claimed that the interpretation of the policy was governed by the law of Missouri. In its per curiam opinion, the Supreme Court said at page 264:

> "While respondent contends that the decision below is not in conflict with the local law, it is not necessary for us to determine that question. It is enough to say that the questions to be decided are those of state law and should have been determined according to the decisions of the state court. Erie R. Co. v. Tompkins, decided April 25, 1938 (304 U. S. 64, ante, 1188, 58 S. Ct. 817, 114 A. L. R. 1487); Ruhlin v. New York L. Ins. Co., decided May 2, 1938 (304 U. S. 202, ante, 1290, 58 S. Ct. 860)."

Ohio Law.

Ohio law upholds the right of the insurer to rely upon express policy conditions regarding notice. The Ohio Supreme Court announced this rule in the case of *Kornhauser, Receiver v. National Surety Co.,* 114 O. S. 24 (1926).

The Surety Co. had issued a fidelity bond in favor of Export Trading Co. of which Kornhauser later became receiver. The bond protected Trading Co. against loss as a result of misconduct upon the part of officers named in a

schedule. Two of the senior officers, Fraunhofer and Haas, made defalcations. The bond required the employer, upon becoming aware of any evidence of dishonesty, to give immediate notice in writing, and, in any event, not later than 5 days, to the home office of the company. The trial court granted defendant's motion for judgment. The Court of Appeals affirmed. The Ohio Supreme Court affirmed both judgments below. In conclusion, the Supreme Court said in its opinion at page 39:

> "Notice was not given of fraud and dishonesty upon the part of Fraunhofer and Haas until December, 1921. It is conceded that this dishonesty occurred several months before that time, and at least one director of the company had knowledge thereof and remained a director for a considerable period after that time. In view of that fact, notice was not given in accordance with the terms of the bond, and judgment must therefore be affirmed."

The precise point of notice to an authorized agent of the insurer, of the violation of a condition avoiding the policy was decided by the Ohio Supreme Court in the case of *Ohio Farmers' Ins. Co. v. Titus,* 82 O. S. 161 (1910).

Titus bought policies of insurance on his barn and on the contents thereof. A fire occurred. The loss was ascertained but the insurer refused to pay on the ground that the policies provided that they would be void if the subject of insurance, or any part thereof, or the real estate, or any part thereof, was and should thereafter become encumbered by mortgage or otherwise. In the litigation it was averred that after the issuance of the policy and before the fire occurred, the real estate on which the barn was situated was encumbered by a mortgage in the sum of $4,000.00 without any agreement therefor being endorsed on the policy.

The evidence showed that when the policy was issued, there was a mortgage for $2,500.00. Titus claimed that when he increased the mortgage to $4,000.00, he informed

the company's county agent of that fact, and that, subsequently, he paid premiums on the policy in question. The trial court submitted the issues to the jury who found in favor of the plaintiff. The Court of Appeals affirmed.

The Supreme Court modified the judgment of the lower courts by deducting the amount of the loss of the building. At page 171 of its opinion, the court said:

> "The insured had the policy in his possession and is presumed to know its provisions. These provisions are valid, they are usually found in such contracts, and are considered necessary for the protection of the company. They cannot be waived by the agent, excepting in the manner stipulated in the policy, and would afford very little protection to the company if they could be. (Union Central Life Ins. Co. v. Hook, 62 Ohio St. 256; The Eureka Fire & Marine Ins. Co., et al. v. Baldwin, 62 Ohio St. 368; Northern Assurance Co. of London v. Grandview Building Association, 183 U. S. 308.) To avoid them it must be shown that the company waived them or is estopped to enforce them, and this cannot be done by proof of acts or representations of the agent, not brought to the knowledge of the company."

The court concludes its opinion at page 173 in these words:

> "The making of the additional incumbrance and the failure to endorse being admitted, and there being no evidence tending to prove waiver by the company, the trial court should have directed a verdict for the company as to the first cause of action, and the judgment will be modified by deducting the amount of the loss of the building."

The *Titus* case was referred to with approval by the Ohio Supreme Court in the case of *Michigan Automobile Ins. Co. v. Van Buskirk,* 115 O. S. 598 (1927). It is to be noted that the *Van Buskirk* decision was four years later than the decision in *Myers v. Ins. Co.,* 108 O. S. 175 (1923), upon which the Court of Appeals relied in the instant case.

In the *Van Buskirk* case, the Supreme Court at page 604 said:

> "In Ohio Farmers' Ins. Co. v. Titus, 82 Ohio St. 161, 92 N. E. 82, this court held that a clause in an insurance policy substantially similar to the above was valid, and that the insurance company could not be deemed to have waived a mortgage incumbrance upon the property simply because its agents had notice or knowledge of the existence of the incumbrance.
>
> * * * * *
>
> "In support of the principle so announced, the per curiam cites the cases of * * * Northern Assurance Co. v. Grand View Building Assn., 183 U. S. 308, 22 S. Ct., 133, 46 L. Ed. 213. In the federal case cited, Mr. Justice Shiras admits the contrariety of decisions upon the legal point involved but states that the decided weight of authority supports the foregoing principle. There is no doubt that in the Ohio cases cited this court has been definitely committed to that principle, unless it has been modified by the rule announced by a majority of this court in Foster v. Scottish Union & National Ins. Co., 101 Ohio St. 180, 127 N. E. 865."

The facts in the case of *Foster v. Scottish Union & National Ins. Co., supra,* are easily distinguishable. In that case, the agent knew at the time the policy was first written of facts contrary to policy conditions which made it void *ab initio.*

In the instant case, the Court of Appeals expressly based its decision on *Myers v. Ins. Co., supra.* The decision rested on the mistaken belief that the Ohio Supreme Court had declared the current law of this state to the effect that notice to an agent would be construed as notice to the insurer at its home office, and that policy provisions to the contrary would be considered waived. The *Myers* case did not announce that principle of law, but only commented upon it by way of *dicta.* The *Myers* case specifically held the insurer not liable. It held valid express conditions

in the application for insurance, although the company's medical examiner admitted having received knowledge of the applicant's sickness before the policy was issued.

The Ohio law with regard to the insurer's qualified representative receiving notice, after the policy has been in existence, of a condition which would avoid the policy not being imputed to the company, is explicitly stated in the case of *Farmers' Ins. Co. v. Titus, supra,* and reaffirmed in the case of *Michigan Automobile Ins. Co. v. Van Buskirk, supra.*

Lower Courts Did Not Follow Ohio Law.

Plaintiff made no claim of waiver of policy provisions in his petition, briefs, or oral arguments. He erroneously contended that, under Ohio law, proof of any notice, oral or otherwise, to a representative of defendant was sufficient compliance with his obligation to the insurer. We quote from plaintiff's petition (R. 3):

> "Plaintiff further says that he has complied with and performed all of the conditions, requirements, covenants and things required of him by the terms of said contract and/or policy of insurance;"

The trial court, ignoring the established local law as announced by the Ohio Supreme Court, erroneously charged the jury as follows (R. 156, 157):

> "Thus, if you believe that Treacy was notified of the injury to Menex on or about May 5th, such knowledge would be assumed to have been transmitted promptly by him and would, as I think, constitute notice to the company as required by the policy."

Although plaintiff neither pleaded nor argued waiver of policy provisions, the trial court erroneously injected that issue into the case when he charged the jury (R. 157) as follows:

> "If you believe Estabrook's testimony that McCormick, Tyler, Bird, and others at the home office where

he was in conference with them on October 7th, told him, Estabrook, that no exception was taken to the lack of direct notice of the injury to the horse, but that it was lack of cooperation by the owner, Howe, I think that any further requirement of notice was waived or that adequate compliance was considered as having been made of the injury to the horse."

Defendant took specific exception to the parts of the charge quoted herein (R. 159).

The Court of Appeals failed to follow local law as announced by the Supreme Court of Ohio in *Kornhauser, Receiver v. National Surety Co., supra,* in *Ohio Farmers' Ins. Co. v. Titus, supra,* and in *Michigan Automobile Ins. Co. v. Van Buskirk, supra.* To the contrary, it relied upon *dicta* in the case of *Myers v. John Hancock Mutual Life Ins. Co., supra.* The judgment entry of the Court of Appeals contains this language (R. 193):

"And it appearing that the questions of fact involved were submitted to the jury under appropriate instructions pertaining thereto, compare Myers v. Insurance Co., 108 O. S. 175, 181 through 183, that the verdict of the jury is amply supported by the evidence, and that there is no prejudicial error in the rulings of the trial judge or in his instructions to the jury;

"It Is Therefore Ordered that the judgment of the District Court be and is affirmed."

Myers Case.

In the *Myers* case, the issue presented was whether the insurer had waived the express condition of the application that the applicant must still be in good health when the policy is issued. The applicant had been examined by Dr. Brady and approved. Two days later, he suddenly became ill with appendicitis. Dr. Brady, a personal friend of the applicant, learned of the illness but did not report it to the insurance company. A few days later, the insurer approved the application at its home office. A couple of days thereafter, the applicant died.

The insurer refused to recognize the claim and tendered back the premium which had been paid. The application contained a clause that the policy should be issued only in the event that the applicant is in the same condition of health at the date of issuance as at the date of application. The Ohio Supreme Court concluded that the defendant had not waived the express condition of the application by reason of Dr. Brady's failure to transmit information to the home office and the company's subsequent approval of the application. The court concludes its opinion in these words:

> "It follows that from both principle and authority Dr. Brady was not such an agent of the company that action upon the part of the company in approving the application for insurance can be held to have been a waiver of express conditions and stipulations because of the mere casual knowledge and information which came to him.
>
> "The judgment of the Court of Appeals is therefore affirmed."

The court's decision was in favor of the insurer upholding the express conditions of the application. By way of *dicta,* the court reasoned that notice to an agent expressly delegated to receive notice or who was placed in a position of general authority, will be considered notice to the principle. That, however, was not the question decided in the *Myers* case. The comment by way of *dicta* is not an expression of local law by the Ohio Supreme Court.

Plaintiff Did Not Comply.

In the instant case plaintiff failed to give notices of injury and death as required. He also failed to submit sworn proof of loss within 30 days. He never furnished affidavits from veterinarians. Should the claimed oral reports to Treacy be considered as sufficient compliance regarding notice, which we expressly deny, plaintiff still is in default as to proof of loss and veterinarian's affidavit.

At the trial, plaintiff offered no admissible legal proof that Menex was dead. He relied entirely on hearsay and self serving letters from persons who did not testify in court. Defendant had no opportunity to question the trainer or veterinarians. Plaintiff did not sustain the burden of proof. There was not sufficient evidence to submit the case to the jury.

OPINIONS BELOW.

The District Court wrote no opinion. Its memorandum overruling defendant's alternative motion for judgment or for new trial appears in the Record at page 184. The Court of Appeals wrote no opinion. Its order affirming the judgment of the District Court appears in the Record at page 193.

CONCLUSION.

WHEREFORE, Petitioner respectfully prays the issuance of a Writ of Certiorari.

JAMES A. BUTLER,
Attorney for Petitioner.

March 8, 1950.

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CHARLES ELMORE CROPLEY

In the Supreme Court of the United States

OCTOBER TERM, 1949.

No. 668.

INSURANCE COMPANY OF NORTH AMERICA,
Petitioner,

vs.

CARL T. HOWE,
Respondent.

BRIEF OF RESPONDENT, CARL T. HOWE, Opposing Petition for Writ of Certiorari.

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INDEX.

Introduction 1

Facts for Writ of Certiorari 3

Argument 14

Question 23

Conclusion 28

TABLE OF AUTHORITIES.

Cases.

Continental Assurance Co. v. Hendrix, 20 So. (2d) 851 16

Dwelling-House Ins. Co. v. Gould, 19 Atl. 793 .....27, 28

Foster v. Scottish Union & National Insurance Company, 101 O. S. 180 2

General Accident Fire and Life Assurance Corp. v. Schero, 151 F. (2d) 825 17

Merchants Ins. Co. of Newark v. Gibbs, 56 N. J. L. 679 21

Myers v. John Hancock Mutual Life Ins. Co., 108 O. S. 175 .....1, 2, 24-25, 28

National Live Stock Ins. Co. v. Henderson, 164 S. W. 852 27

Smith v. German Ins. Co., 54 N. W. 239 17

Trippe v. Provident Fund Soc., 140 N. Y. 23 21

William Zoller Co. v. Hartford Fire Ins. Co., 116 Atl. 359 28

Texts.

45 *C. J. S.*, Insurance, Sec. 692 23

2 *Couch's Cyclopedia of Insurance Law*, Secs. 525 and 1560 24

2 *Mechem on Agency* (2nd Ed.), Section 1834 .....1, 28

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BRIEF OF RESPONDENT, CARL T. HOWE,
Opposing Petition for Writ of Certiorari.

INTRODUCTION.

The petitioner's alleged assignments of error presents the following question to the court:

Under the law of the State of Ohio, may the owner of an insured animal who gave no written notice of injury to the insurer's Home Office, as required by the policy, recover for the subsequent death of the animal upon proof that he gave oral notice to the agent of the insurer at its Service Office, whose duty was to acquire such notice and to transmit such knowledge to the Home Office and who did transmit such notice to the Home Office?

The District Court and Court of Appeals answer, "Yes." Petitioner contends that the answer should be, "No."

This question was answered by the Supreme Court of Ohio in the case of *Myers v. John Hancock Mutual Life Insurance Company,* 108 Ohio St. Rep. 175, wherein the Supreme Court stated that the rule set forth in 2 *Mechem on Agency* (2nd Ed.), Section 1834, is the recognized law in the State of Ohio. On pages 182 and 183 of its opinion the Supreme Court used the following language:

"The further pertinent statement upon this proposition is made in 2 Mechem on Agency (2d Ed.), Section 1834:

" 'If the theory upon which notice is to be imputed be the legal identity of the principal with the agent, then the person to whom the notice comes must be such a person and acting in such a capacity that it may fairly be said that, for the time being, he is the principal. If the true theory be that the agent owes a duty to communicate, then the person to whom the notice comes must be such a one and acting in such a capacity that it may fairly be said that the principal looks to him for information concerning the subject-matter; that he is the person to whom information is likely to come, and whose duty it would be to communicate it.' "

The petitioner cites four Ohio State Supreme Court cases in its brief, to substantiate its alleged assignment of error. A careful reading of these cases indicates that each case is distinguishable from this case. Actual notice to the insured is not present in any of the cases cited by the petitioner and the court does not set forth any law, in any of the cases cited by the petitioner, that would be in conflict with the law followed by the District Court and Court of Appeals in this case. In fact, the court, in *Foster v. Scottish Union & National Insurance Company,* 101 O. S. 180, one of the cases referred to in the petitioner's brief, sets forth the following recognition of the Ohio law which is consistent with the decisions of the District Court and Court of Appeals in this case and with the law as set forth in the *Myers* case. On pages 187 and 188 of its opinion the court said:

"It is settled in this state that the knowledge of the agent with reference to the subject-matter concerning which he acts in pursuance of authority from his principal is the knowledge of the principal. (*Massachusetts Life Ins. Co. v. Eshelman et al., Exrs.,* 30 Ohio St., 647, and *First Natl. Bank of New Bremen v. Burns et al.,* 88 Ohio St., 434.) * * *"

FACTS FOR WRIT OF CERTIORARI.

Six witnesses testified at the trial, Mr. Carl T. Howe, Respondent, and five agents of The Insurance Company of North America, Petitioner. The insurance agents and their respective positions, duties and authorities with the Petitioner are as follows:

Mr. George G. Estabrook of Cleveland, Ohio testified that he was an insurance agent operating individually under the name of Estabrook & Co. (R. 19) and that he was a licensed agent of The Insurance Company of North America (R. 20). Mr. Treacy testified that Mr. Estabrook was a licensed agent for the Petitioner (R. 127).

Mr. Fred W. Treacy testified that he was Assistant Fire & Marine Manager of The Insurance Company of North America in the Branch Office or Service Office at Cleveland, Ohio (R. 119); that twenty years ago he left The Hartford Insurance Company and went with the Petitioner to assist them in starting a Horse Mortality Department and that he had helped prepare these policies as they were written (R. 120). Mr. Clinton Bird from the Home Office of The Insurance Company of North America and Assistant Secretary of said company, came from Philadelphia to testify, and in regard to the duties and authorities of Mr. Treacy, testified as follows:

> "The Court: A very important question for my benefit, and the Jury's benefit, I would like to know if, assuming just for the sake of the question, that Mr. Treacy's office or Mr. Treacy or his office received notice from Mr. Estabrook or Mr. Howe, or both, that Menex had been injured in the race, was it the duty of Mr. Treacy's office to transmit that to your office at Philadelphia?
>
> The Witness: If he had been notified it would have been his duty.
>
> The Court: That is the way it worked, is that right, it would have been his duty?
>
> The Witness: That is right." (R. 141.)

Mr. Estabrook did all of his business with the Cleveland Office and never with the Home Office at Philadelphia (R. 20). When the insurance on the horse Menex was sold, the policies were issued through Mr. Treacy and the Cleveland Branch Office or Service Office, and when any claims arose under the contract of insurance or policies of insurance that were sold by Mr. Estabrook, they were always handled by Mr. Treacy of the Cleveland Office (R. 20, 21).

Mr. H. J. McCormick came from Philadelphia and testified that his occupation and position with The Insurance Company of North America was "Inland Marine Loss Adjuster, Head Office"; that he had been with the Company for twenty-five years (R. 96), that it was the duty of the Branch Office, the Service Office in Cleveland, if it learned of any facts that were of importance to The Insurance Company of North America to pass such facts on to the Home Office in Philadelphia; that if the Service Office in Cleveland learned of an injury to a horse that was insured by its Company, it was the duty of that office to pass such knowledge on immediately to the Philadelphia Office, the Home Office (R. 108); that Mr. Treacy was hired, and that it was part of Mr. Treacy's duties, to report to the Home Office knowledge that he learned of injury to any horse insured by the Petitioner company (R. 118).

Mr. Clinton Bird came from Philadelphia to Cleveland to testify in this case, and stated that he was Assistant Secretary to The Insurance Company of North America and its allied companies, and that the particular branch of the business to which he devoted his attention was Inland Marine Insurance; that he would be the one at the Home Office in Philadelphia who would receive any notice from Mr. Treacy in regard to an injury to a horse that was insured by the Petitioner company (R. 140); and that it was Mr. Treacy's duty to notify the Home Office if Mr. Treacy learned of any injury to a horse that was insured by the Petitioner company (R. 141).

Mr. Alonzo Louis Tyler came from Philadelphia to Cleveland to testify in this case, and stated that he was the Assistant Marine Loss Manager of The Insurance Company of North America, and that he was stationed at the Home Office in Philadelphia (R. 142); he further testified that it was the duty of the Branch Office in Cleveland, and it was the duty of Mr. Treacy to transmit to the Home Office any information received in regard to injury to any horse that was insured by the Petitioner company (R. 146).

Mr. Carl T. Howe, Respondent, testified that he lived in Cleveland and was in the dry-cleaning business, and that he had owned race horses and had raced these horses; in other words, that he had a string of race horses; that he did not always have a trainer exclusively but placed his horses with a trainer who would train his horses and other people's horses; that he was the owner of the race horse "Menex" sired by Menow (R. 71); that he bought Menex in the latter part of November, 1945, at a claiming race at Jamaica, Long Island and paid $8000 for him; that at the time Menex died he was seven years old; that during the life of Menex he had won in earnings upwards of $50,000. Mr. Howe testified that shortly after Menex had ran second in a large race at Hialeah Park in Florida another horseman offered him $15,000 for Menex, which he refused. Mr. Howe further testified that in a great number of races, at least four or five, after Mr. Howe became the owner of Menex, the horse was in the money (meaning that the horse came in fourth or better), and that as long as he had owned Menex the horse had better than paid his own way (R. 72).

Mr. Howe testified that he had placed insurance on several of his horses with Mr. Estabrook, who in turn wrote the policies with the Petitioner company; that in November, 1945 Mr. Estabrook through Mr. Treacy of the Cleveland Office, obtained a policy of insurance for one year on the horse Menex for Mr. Howe in the sum of $8000, the

premium being $400. When this policy expired, Mr. Treacy informed Mr. Estabrook that he was unwilling to renew the policy for that amount because of the fact that the horse was then on the West Coast and the owner, Mr. Howe, was in Cleveland. The policy was renewed in the sum of $5000 (Plaintiff's Exhibit 1, R. 24). This policy was issued on the 16th of November, 1946, for one year, to expire on November 16, 1947. This policy was issued by Mr. Treacy in Cleveland and it was counter-signed by Mr Estabrook as Agent for the Petitioner (R. 25).

On the night of May 2, 1947, Mr. Howe's trainer, George Cummins, telephoned from Tanforan Track on the Pacific Coast to Mr. Howe that Menex had run a race that afternoon and had won the race; that the horse had been cut down in the race coming home; that the track veterinarian examined and treated him and that the horse would be all right in a few days.

Mr. Howe who had received this telephone call about 10 o'clock at night, called Mr. Estabrook the next day and told him of the fact that the horse had won the race and that he had been cut down and had received a slight injury to his leg and to be sure to protect Mr. Howe on his insurance policy (R. 74). The winning by Menex of this race meant in the neighborhood of $2000 to Mr. Howe (R. 74). On Saturday, May 3rd, the Cleveland Branch Office or Service Office of The Insurance Company of North America was closed and on Monday, May 5th, at about 11 o'clock in the morning, Mr. Estabrook went to the office of The Insurance Company of North America in the Union Commerce Building in Cleveland and told Mr. Treacy that Mr. Howe had telephoned him that on Friday afternoon the horse Menex had won a race at Tanforan Track on the Pacific Coast, that the horse had been cut down by another horse coming down the home stretch and had received a slight injury to his leg. At that time Mr. Treacy did not request Mr. Estabrook or Mr. Howe to make a written notice or a telegraphic notice to the Home Office, and Mr.

Treacy asked no further information than that given to him by Mr. Estabrook at that time (R. 26).

On May 15, 1947 Mr. Howe arrived in Portland, Oregon where his horses had been moved for the Race Meet at Portland to see for the first time racing at night under lights, and also to see his horses run and he expected to see his horses win some races. When he arrived in Portland on May 15th he was met by his trainer and they went out to the track and stables and there he saw his horse Menex. He was informed by the trainer and the veterinarian that the horse was getting along as well as could be expected but the horse looked ill to him (R. 75).

The horse was being attended by Dr. Phelps, one of the track veterinarians, and also by Dr. Schneider also a track veterinarian. On that same day, May 15th, Mr. Howe called Mr. Estabrook, told him that he had arrived in Portland, that he had seen his horses and that all of them were in good shape except Menex and that Menex looked ill, and he told Mr. Estabrook to be sure and protect him on his policy (R. 76). Mr. Howe further told Mr. Estabrook that the veterinarians assured him that the horse would be able to race within ten days but that he, Mr. Howe, was skeptical of that because to Mr. Howe the horse looked pretty sick, and on May 15th Mr. Estabrook went over to The Insurance Company of North America Branch or Service Office and repeated to Mr. Treacy what Mr. Howe had just telephoned him from Portland. At that time Mr. Treacy did not make a request that either Mr. Estabrook or Mr. Howe notify the Home Office in Philadelphia in writing or by telegraph of the injury to the horse Menex, and at that time Mr. Treacy did not refuse to accept the notice in regard to the injury to the horse given him by Mr. Estabrook. At that time Mr. Treacy did not ask any further information than was given to him by Mr. Estabrook (R. 27).

About May 25th Mr. Howe left Portland and returned to Cleveland. The racing was not over at Portland at that

time but soon would be and the trainer was scheduled to take Mr. Howe's horses on to Vancouver for a Race Meet there. When Mr. Howe left Portland on the 25th of May his horse Menex appeared to him approximately the same as it did upon Mr. Howe's arrival on May 15th. When he left, the veterinarian told Mr. Howe not to worry about his horse, that he was coming along all right. Upon Mr. Howe's return to Cleveland he saw Mr. Estabrook and told him of his trip to Portland and the condition of his horse Menex (R. 77).

On July 7, 1947 Mr. Howe received an Air Mail letter from his trainer dated July 5th, from Vancouver, B. C., stating that the horse Menex had died on June 27th, that the damage he had received in the race was a cut on the leg that went almost through the horse's suspensory ligament, cut almost into near the sesamoid joint and that infection set in and thus caused the death of the horse (letter of July 5th, Defendant's Exhibit A, R. 77-78).

Immediately upon receipt of this letter, Mr. Howe called Mr. Estabrook and then went to Mr. Estabrook's office and Mr. Howe and Mr. Estabrook then went to The Insurance Company of North America's Office in Cleveland and showed the letter to Mr. Treacy. Mr. Treacy seemed surprised that the horse died and said "Gee whiz, I didn't know he was so sick" (R. 78). Mr. Treacy produced a piece of paper called "Proof of Loss" to be filled out by Mr. Howe (Plaintiff's Exhibit 2, R. 167). Some of the questions to be answered in this proof of loss were not within the knowledge of Mr. Howe and he so told Mr. Treacy. Mr. Treacy also told Mr. Howe that it would be necessary to have statements from the veterinarians in attendance. This was on the 7th day of July, 1947.

There was no complaint by Mr. Treacy of the proof of loss being filed too late, nor did Mr. Treacy inform Mr. Howe or Mr. Estabrook that this proof of loss should be sent to the Home Office in Philadelphia (R. 79). Mr.

Treacy told Mr. Howe and Mr. Estabrook to take the proof of loss and send it to the trainer on the West Coast and for the trainer to get the necessary answers (R. 28). Mr. Howe immediately put the proof of loss in an envelope and mailed it to his trainer Mr. Cummins at Vancouver, with instructions to fill it out and get the proofs from the veterinarians (R. 80). The trainer collected all the statements from the veterinarians and sent back the proof of loss filled out, together with the statements and bills from the veterinarians to Mr. Howe, and Mr. Howe received same on the 18th of August, 1947. Mr. Howe immediately took the executed proof of loss and the veterinarians' statements to Mr. Estabrook and the two of them immediately went over to the office of The Insurance Company of North America and saw Mr. Treacy and while in Mr. Treacy's office Mr. Howe swore to the proof of loss and same was notarized by a notary in Mr. Treacy's office (R. 80). At that time Mr. Treacy asked for no further information (R. 34).

At that time there was no complaint made that Mr. Howe should not file the proof of loss with Mr. Treacy nor was he advised by Mr. Treacy to send it to the Home Office. On the 18th of August no complaint was made by Mr. Treacy that Mr. Howe and Mr. Estabrook had failed to notify him of an injury to the horse back in the first part of May, and no complaint was made to the effect that Mr. Howe had failed to file any notice with him when the horse received injury in the first part of May (R. 80):

> "Q. And it was notarized by a Notary in his office? A. Yes, sir.
>
> Q. And after you had done that, what did Mr. Treacy say, if anything? A. Well, I asked him 'When can I have my check.' He said 'It will be a matter of a few days. It will come from the Philadelphia Office.'
>
> Q. Then after that, were you requested any further information, to gather or give them any further information? A. No; I was not.

Q. And what was the next that you heard? A. Well, I asked Mr. Estabrook several times—I'd call him and ask him if he had heard from the insurance company, as I hadn't received any check, and he said he would contact the insurance office, Mr. Treacy, and see what was wrong. And each time he told me that they were still investigating the statements from the veterinarians. And then the next thing I heard was Mr. Estabrook called me in October saying that he had received a telegram from the Philadelphia office declining to pay the policy." (R. 81.)

On the 18th day of August, when the Live Stock Proof of Loss (Plaintiff's Exhibit 2, R. 167) was sworn to by Mr. Howe and given to Mr. Treacy, Plaintiff's Exhibits 2, 4, 5, 6 (R. 167, 169, 170) and 7 were also turned over to Mr. Treacy as part of the live stock proof of loss (R. 29, 30, 31, 32 and 33).

Mr. Estabrook testified that he was in Philadelphia on the 7th of October, 1947 and that he talked to Mr. Bird, Mr. McCormick and Mr. Tyler, and testified as follows relative to the conversations with these three officers of the defendant appellant:

"Q. In your conversation in Philadelphia, you may state whether or not you told them that you gave notice of the injury to the horse on May the 5th? A. I did.

Q. Did they say words to the effect that they had received it immediately thereafter? A. They surely did; yes, sir." (R. 34.)

About October 1st Mr. Estabrook went over to the office of The Insurance Company of North America in Cleveland after having received a telephone call from Mr. Treacy and they were denying the liability under the policy (R. 35). Mr. Treacy and Mr. Young (Manager of the Cleveland Office) were not positive as to the definite reason for refusing to pay the face value of the policy. Mr. Estabrook then demanded written declination from Philadelphia. On the 6th day of October 1947 Mr. Estabrook received a telegram (Plaintiff's Exhibit 8, R. 171)

from The Insurance Company of North America from Philadelphia signed by the Home Office and addressed to Mr. Estabrook (R. 37). This telegram reads as follows:

> "CARL T HOWE POLICY 1HL17953 HORSE MENEX REPLYING YOUR REQUEST FOR TELEGRAPHIC EXPRESSION OUR POSITION POLICY WAS VOIDED BY NON COMPLIANCE WITH NOTICE CLAUSE. LIABILITY IS DENIED ON ALL GROUNDS AFFORDED BY THE FACTS AND THE CONTRACT OF INSURANCE RESERVING ALL OUR RIGHTS THEREUNDER. PLEASE NOTIFY ASSURED INS CO OF NORTH AMERICA Bird"

Immediately upon receipt of this telegram, Mr. Estabrook made reservations and flew from Cleveland to Philadelphia. When he arrived he saw Mr. Tyler, Mr. Bird and Mr. McCormick (R. 38).

Mr. Estabrook in conversation with these three officers at the Home Office in Philadelphia of the defendant appellant recited to them the entire history of the Menex case as he saw it. Mr. Estabrook told them that he had given Mr. Treacy notice of the injury to the horse on May 5th and they in turn stated that Mr. Treacy had immediately given them such notice. Mr. Estabrook also told them about the notice on May 15th that he had given Mr. Treacy in regard to the injury to the horse Menex and they in turn replied to the effect that immediately Mr. Treacy had notified the Home Office (R. 39). Mr. Estabrook related to these three gentlemen of his visit with Mr. Howe and Mr. Treacy on July 7th and of giving notice of the death of the horse at that time and these gentlemen said they knew about that having been informed by Mr. Treacy.

Mr. Estabrook then explained to them and told them about having to send the proof of loss to the Pacific Coast, getting it back and having it sworn to in the Branch Office before Mr. Treacy and the notary, their notary, and testified as follows:

> "Q. And did they in turn inform you that they had immediate notice of that? A. They did.

Q. This proof of loss, the policy itself, and these veterinary statements, were they returned to you or to Mr. Howe? A. The Insurance Company of North America—the three gentlemen had all these papers when I arrived at Philadelphia. They had them there and they were returned to me with that letter of October 15th, I believe, that we have referred to previously.

Q. But they were returned to you by letter? A. To me.

Q. To you and not to Mr. Howe? A. That is correct." (R. 40.)

In this conference in Philadelphia, when Mr. Estabrook asked these three gentlemen of the Home Office why they were declining to pay the face value of the insurance policy on the life of the horse Menex they stated that their reason for their declination was lack of cooperation between Mr. Howe and the Insurance Company:

"Q. I will ask you whether or not at that time they told you that they were denying paying the face value of the policy on the race horse Menex because of failure to give notice? Now, do you understand the question? If you don't, I will have it read to you. A. Please.

Mr. Marsteller: Will you kindly read it to him?

(Question read.)

A. They did not."

After arriving back in Cleveland, Mr. Estabrook wrote to these gentlemen (R. 41) and he received a letter (Plaintiff's Exhibit 9, R. 172) dated October 15, 1947 and signed "A. L. Tyler, Assistant Marine Loss Manager." This letter quotes from the letter that Mr. Estabrook wrote to the Home Office under date of October 9, 1947 (R. 42) and in this letter (Plaintiff's Exhibit 9, R. 172) of October 15, 1947 signed by A. L. Tyler, Assistant Marine Loss Manager, we find these words:

"The declination of the assured's claim for the death of 'Menex' did not grow out of any vague dissatisfaction on our part with the assured's 'lack of

cooperation.' I hope I never gave you any such impression. The declination of claim resulted from the failure of the assured to fulfil policy requirements as to 'Immediate Notice of Illness or Injury.'" (R. 43.)

So, with the telegram of October 6 (Plaintiff's Exhibit 8, R. 171) and the letter of October 15th (Plaintiff's Exhibit 9, R. 172), the Petitioner in writing has stated twice that the reason for the declination of the assured's claim for the death of the race horse Menex resulted from the failure of the assured to fulfil policy requirements as to "Immediate Notice of Illness or Injury."

Mr. Estabrook testified that in his conversation with these three officers of the Petitioner in Philadelphia that they did not decline to pay the policy because of immediate lack of notice but stated that their reason for declining to pay the policy was lack of cooperation on the part of Mr. Howe, the owner of the horse (R. 43).

Mr. Estabrook testified that once in the Cleveland Office he had seen a report on an investigation caused to be made by the Petitioner. This report, which was dated September 18, 1947 was shown to Mr. Estabrook who identified it and it became Plaintiff's Exhibit 10, R. 174 (R. 44). This exhibit is an investigation made by the Portland Office of the Petitioner and does not dispute in any way Plaintiff's Exhibits 3, 4, 5, 6 and 7. This report (Plaintiff's Exhibit 10, R. 174) was in Philadelphia when Mr. Estabrook was in conference with the three officers of the Petitioner company.

"Q. I further notice that at the end of the policy there is a short rate premium and cancellation table. On this horse the insurance contract started on November 16, 1946. Therefore, for a year, it would expire November 16, 1947. This horse died on June 27, 1947, and there are short or return premiums on part of return premiums, according to this table. Was there any premium in this policy returned in this case? A. No, sir.

Q. Was there any offer of return premiums in this case? A. No, sir." (R. 47.)

Mr. Treacy on cross examination admitted that some time in the early part of May, 1947 (the date he could not fix), Mr. Estabrook informed him that Menex won a race (R. 127):

> Question to Mr. Treacy: "Just to refresh your memory, isn't it true that he told you the horse won the race? He further told you that the horse got a slight injury in the race, but that he would be running in a week or ten days? A. I am sorry, I don't remember.
>
> Q. But, you won't say definitely that he didn't say that? A. I don't remember that he did say that." (R. 129.)

ARGUMENT.

The Sole issue in this case is NOTICE. As said by the trial Judge in his memorandum on the alternative motion for judgment or for new trial:

> "The principal question of Notice seemed to me to be one of mixed law and fact. On this issue there was sharply conflicting testimony as to what was said and done at the Cleveland and the Home Office of the defendant. This conflict was, as I think, fairly submitted to the jury for its determination."

Also, the trial Judge, in his same memorandum, used this language:

> "It seemed to me at the trial, and it seems to me now, that as evidence was developed in the trial the plaintiff was entitled to the benefit of the jury's verdict on the issues of fact and that the plaintiff also was entitled to the rules and instructions submitted for the jury's guidance."

And in this same memorandum the Court used this language:

> "Certain it is that the policy was taken out and premium paid in good faith. The events insured against occurred. The insured relied upon those who had sold him the policy. The defendant was notified and knew of the injury to and death of the horse

through its authorized agents. The insured did all that was required of him as I review the facts and the issues." (R. 184.)

Anyone reading this record will get the same opinion as expressed by Judge Jones, who presided at the trial.

Some of the testimony given by Mr. Estabrook was denied and/or contradicted by the other insurance agents of the Petitioner. It was a pure question of fact for the jury to determine whether or not Mr. Estabrook was telling the true story or whether or not the other insurance agents of the Petitioner were telling the true story. The jury in its verdict showed that they believed the story told by Mr. Estabrook.

It is admitted that Mr. Treacy of the Branch Office or Service Office at Cleveland had the duty to immediately notify the Home Office of any knowledge that he received in regard to an injury to a horse that was insured by the Petitioner. Mr. Estabrook testified that on May 5th he notified Mr. Treacy that the horse Menex had won a race and had received an injury in the race. He further testified that on May 15th he again notified Mr. Treacy of the injury to the horse Menex and the condition of the horse on that date. Notice to Mr. Treacy whose duty it was to immediately transmit such notice to the Home Office is notice to the Petitioner and meets with the requirements of the policy. But, the testimony in this case goes further than that. Mr. Estabrook testified that when he went to the Home Office in Philadelphia the early part of October and talked with Mr. Bird, Mr. McCormick and Mr. Tyler, these three men stated that Mr. Treacy had immediately notified the Home Office of the injury to the horse. So, when the jury rendered its verdict for the Respondent, the jury found the fact to be that not only did Mr. Treacy have notice of the injury to the horse but that the Home Office had notice of the injury to the horse shortly after the horse received the injury.

In September the Petitioner caused its own investigation to be made and at that time the Petitioner had the statements of the veterinarians who treated the horse, the statement in regard to the post mortem that was performed upon the horse, and the sworn proof of loss all in its possession, and after the investigation made by the Petitioner it asked no further information from the Respondent. The Petitioner's investigation admitted the death of the horse and a report on this investigation was part of the Respondent's evidence (Pl. Ex. 10, R. 174). And after that investigation, and almost a month after that investigation, did the Petitioner disclaim the policy, and when the Petitioner was forced to give in writing its declination of the policy, it disclaimed on the sole ground as follows:

> "The declination of claim resulted from the failure of the assured to fulfil policy requirements as to 'immediate notice of illness or injury.'" (R. 43 and Plaintiff's Exhibits 8, 9, R. 171, 172.)

The case was tried to the jury on the sole issue of failure to give immediate notice to the Home Office when the horse received the injury on May 2nd. The Petitioner is limited to the notice proposition as hereinabove stated.

In the case of *Continental Assurance Co. v. Hendrix,* 20 So. (2d) 851 (Supreme Court of Ala., Jan. 1945), on page 853 the Court used this language:

> "This replication is based upon the well-accepted theory that, where an insurer denies liability for a loss on one ground, at the time having knowledge of another ground of forfeiture, he cannot thereafter insist on such other ground if the insured has acted on its asserted position and incurred prejudice or expense by bringing suit or otherwise. 29 Am. Jur. p. 667; Liverpool & London & Globe Ins. Co. v. McCree, 213 Ala. 534, 105 So. 901; Travelers' Ins. Co. v. Plaster, 210 Ala. 607, 98 So. 909; Bankson v. Accident & Cas. Co., 244 Ala. 371, 13 So. 2d 398; Georgia Home Ins. Co. v. Allen, 128 Ala. 451, 30 So. 537."

In *General Accident Fire & Life Assurance Corp. v. Schero,* 151 F. (2d) 825 (1945), on page 827 the Court said:

> "On the question of waiver, the law is also well settled in Florida and generally elsewhere:[10] That acts and conduct of an insurer after a loss has occurred, inconsistent with a particular defense especially where the insured has been induced to act, will constitute a waiver of the defense; and that while, where the facts are not in dispute, the question of waiver vel non is one of law, ordinarily waiver presents a question of fact."[11]

In *Smith v. German Ins. Co.,* 65 N. W. 236 (1895), the Court on page 239 used the following language:

> "We think the court was also right in stating to the jury that, if the painters were included within the term 'mechanic' as used in the policy, clearly there was a waiver of any such claim by the letter of October 1, 1894. In the letter the company admits thoroughly examining the loss, the origin of the fire and attendant circumstances, and undertakes to state definitely its reasons for denying liability on the policy. It is apparent that the ground, and the only ground, upon which all liability was denied, was the storage of gasoline, though in the former part of it mention was made that men had been employed to burn off this paint. Good faith required that the company should apprise the plaintiff fully of its position; and, failing to do this, it estops itself from asserting any defense other than that brought to the notice of plaintiff. *Towle v. Insurance Co.,* 91 Mich. 227, 51 N. W. 987, and cases there cited. The defendant having specifically called the attention of the insured to its objections to

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[10] "Palatine Ins. Co. v. Whitfield, 73 Fla. 716, 74 So. 869; Industrial L. & H. Ins. Co. v. Cofield, 110 Fla. 315, 148 So. 549; Sovereign Camp v. Lee, 125 Fla. 736, 171 So. 526; Appleman on Insurance Law and Practice, Vol. 5, p. 786, § 3597; 29 Am. Jur. § 832, p. 633; id., §§ 869, 870 and 871, pp. 666, 667; § 872, p. 668."

[11] "Law and Fact in Insurance Cases, Texas Law Review, note 7, supra, at pp. 14 and 15; 29 Am. Jur., § 801, p. 606."

paying the policy, reiterating the claim made, it limited its complaint to the use and storage of gasoline. No more definite statement could have been made, and it operated as a waiver of other causes of complaint and defenses to the action."

On July 7 when Mr. Howe started to make out the proof of loss, Mr. Treacy then informed him that he would have to have statements from the trainer and the various veterinarians who had attended the horse and a statement in regard to the post mortem made by the veterinarian. He did not tell Mr. Howe and/or Mr. Estabrook that these statements by the veterinarians must be sworn to. They did tell Mr. Treacy that they would have to write to Oregon and Vancouver to get these statements. When so told, Mr. Treacy did not object and say they would be too late.

If Mr. Treacy, on July 7, had informed Mr. Howe and/or Mr. Estabrook that the statements from the veterinarians must be sworn to, then, of course, they would have obtained sworn statements instead of the statements which they did obtain and filed with the Petitioner. If Mr. Treacy had told them on July 7, that they were late in obtaining the statements and the necessary information to be contained in the proof of loss, then Mr. Howe would undoubtedly have used the telephone or the telegraph to obtain these statements in less time.

When, on August 18, Mr. Howe signed and swore to the proof of loss and attached to same the statements from the veterinarians, there was no complaint by Mr. Treacy that these statements were late nor that they were not in proper form because they were not sworn to by the veterinarians. Mr. Treacy did tell Mr. Howe at that time, his check would soon be sent to him from the Home Office.

Shortly after the sworn proof of loss and the veterinarians' statements were filed with Mr. Treacy, he transmitted same to the Home Office. When the Home Office received this sworn proof of loss and accompanying

veterinarians' statements, it did not inform Mr. Howe or Mr. Estabrook that the proof of loss and statements were late, nor did it complain that the proof of loss and the statements were not in proper order according to the provisions of the policy because same were not sworn to. What did the Home Office do when it received the sworn proof of loss and the accompanying veterinarians' statements? It caused to be made an investigation by its Service Office at Portland, Oregon, and it was considerably more than a month after the Petitioner had received a report on its own investigation that it refused to pay the amount claimed on the policy, and when it disclaimed the policy, it was not on the ground that the proof of loss was irregular and did not comply with the conditions of the policy. It was not on the ground that the horse had not died. It was not on the ground that the proof of loss was filed too late, but on the sole ground that it had not received immediate notice of illness or injury to the horse. Its grounds for the declination of the claim on the policy is in writing (Pl. Exs. 8, 9; R. 171, 172).

On August 18 Mr. Howe and Mr. Estabrook went to Mr. Treacy's office and filed the sworn livestock proof of loss (Pl. Ex. 2, R. 167 and Pltff.'s Exs. 3, 4, 5, 6 and 7, R. 169, R. 170, R. 171). When questioned in regard to some of the facts that took place at said meeting, Mr. Howe testified as follows:

"Q. Was there any complaint made that you should not file it with him but bring it to the Home Office?

A. No, sir.

Q. Did he at that time make any statement that you had failed to file a notice of injury or anything said about that on the 18th?

A. No, not at that time.

Q. Did you swear to this proof of loss?

A. Oh, yes.

Q. In his office?

A. Yes.

Q. And it was notarized by a notary in his office?

A. Yes.

Q. And after you had done that, what did Mr. Treacy say, if anything?

A. Well, I asked him, 'When can I have my check?' He said, 'It will be a matter of a few days. It will come from the Philadelphia office.'

Q. Then after that were you requested any further information, to gather or give them any further information?

A. No, I was not." (R. 80, R. 81.)

The above testimony was corroborated by Mr. Estabrook when he testified on the same subject.

"Q. How about on August 18 when you filed a full proof of loss. Was anything said about any check or voucher being issued?

A. Well, Mr. Howe inquired when he could expect his money and Mr. Treacy said it would be shortly, as soon as these papers cleared through the Home Office; and that the draft would have to be issued in Philadelphia; that he, as usual, could not issue that particular loss draft." (R. 35.)

From this testimony it is plain to see that the insured in good faith did what he plainly intended as a compliance with the requirements of his policy. Good faith equally required that the Petitioner should have promptly notified him of their objections so as to give Mr. Howe the opportunity to obviate these objections and Mr. Treacy's silence in making no objections but in going further and stating that the check would be issued in Philadelphia and would be coming through to Mr. Howe shortly so misled Mr. Howe to his disadvantage and caused Mr. Howe as any reasonable person to believe that the insurance company was satisfied that he had fully complied with the conditions of the policy and that he would be paid in a short time the face value of the policy and that there was nothing further upon the part of Mr. Howe to do. It is maintained by counsel for the Respondent that this is

clear and sufficient evidence of a waiver of all of the conditions which the Petitioner now claims were not performed by Mr. Howe and that the defendant is now estopped from setting up as a defense a failure to comply with certain conditions of the policy.

In the case of *Merchants Ins. Co. of Newark v. Gibbs*, 56 N. J. L. 679, 29 A. 485, 44 Am. St. Rep. 413, the Court says:

> "• • • It is agreed, therefore, that the proofs were not furnished within the prescribed time; but it appeared in evidence that, after the defendant company had received these proofs, a demand was made upon the insured that he should furnish to the company the certificate of the nearest magistrate or notary that he believed that insured had himself sustained loss by the fire to a specified amount. The conditions of the policy entitled the company to make such a demand, and with this demand the insured complied. Under the adjudicated cases in this state, this clearly constituted a waiver of the objection that the proofs were not furnished in time. Jones v. Insurance Co., 36 N. J. Law, 29; Insurance Co. v. Maackens, 38 N. J. Law, 564; Insurance Co. v. Meyer, 39 N. J. Law, 482; Martin v. Insurance Co., 44 N. J. Law, 485. • • •"

And in the case of *Trippe v. Provident Fund Soc.*, 140 N. Y. 23, 35 N. E. 316, 22 L. R. A. 432, 37 Am. St. Rep. 529, the Court on page 317 uses this language:

> "But, even if the defendant's construction of this condition was correct, we think, by its acts, the objection has been waived, and cannot now be urged as a defense. The notice served on the 2d of September was retained, without objection, and another served on the 15th of October, after the plaintiff had been appointed administratrix. On the 12th day of October, upon written application to the defendant, it furnished the necessary blanks for proofs of loss. These proofs were made and forwarded to the defendant, in compliance with the terms of the contract, and were retained without objection. On the 19th of March following, the defendant called for further information,

which was given. It is well settled that such defenses are waived when the company, with knowledge of all the facts, requires the assured, by virtue of the contract, to do some act, or incur some expense or trouble, inconsistent with the claim that the contract had become inoperative in consequence of a breach of some of the conditions. McNally v. Insurance Co., supra; Roby v. Insurance Co., 120 N. Y. 510, 24 N. E. Rep. 808; Titus v. Insurance Co., 81 N. Y. 410, 419; Benninghoff v. Insurance Co., 93 N. Y. 495; Goodwin v. Insurance Co., 73 N. Y. 480; Brink v. Insurance Co., 80 N. Y. 108; Jones v. Insurance Co., 117 N. Y. 103, 22 N. E. Rep. 578; Armstrong v. Insurance Co., 130 N. Y. 560, 29 N. E. Rep. 991; Insurance Co. v. Edwards, 122 U. S. 457, 7 Sup. Ct. Rep. 1249. The acts of the defendant in receiving and retaining these papers, without objection, and calling for others, are consistent only with the theory that the contract was still considered in force; and as the plaintiff acted accordingly in performance of its conditions, subsequent to the loss, the defendant ought not to be permitted now to change its position, and assert that after 10 days from the accident the obligations of the policy virtually ceased, by reason of failure within that time to serve notice of death."

Plaintiff's Exhibit 1 (R. 161) is the insurance policy insuring the horse Menex for one year from the 16th day of November, 1946 to the 16th day of November, 1947. At the extreme end of this policy is a short-rate premium and cancellation table. It is to be remembered that this horse died on June 27, 1947. There was no premium returned to the insured nor was there any offer of return premium under this policy (R. 47). If it was the intention of the insurance company to declare this policy void as stated in the telegram (Pl. Ex. 8, R. 171), then in good faith and under the terms of the policy of insurance, the insurance company should have returned or offered to return part of the premium of $250.00 which was paid by Mr. Howe to the Petitioner when the policy was taken out on the horse Menex

as per the schedule of short-rate premium and cancellation table.

QUESTION.

Under the law of the State of Ohio, may the owner of an insured animal who gave no written notice of injury to the insurer's Home Office, as required by the policy, recover for the subsequent death of the animal upon proof that he gave oral notice to an agent of the insurer in its Service Office, whose duty was to acquire such knowledge and to transmit such knowledge to the Home Office and who did transmit such knowledge to the Home Office?

The District Court and Court of Appeals answer "yes."

Petitioner contends that the answer should be "no."

The oral notice given by Mr. Estabrook to Mr. Treacy in Cleveland on the 5th day of May that Menex on the 2nd day of May had won a race at Tanforan Track and was injured in the race was a compliance with the policy of insurance issued by the Petitioner on the horse Menex in regard to the clause of the policy which reads:

> "In event of illness or injury of any animal hereby insured, the assured shall immediately give notice, with the name of the veterinarian in attendance, the nature of the illness or injury, to the company by telegram at 16 Arch Street, Philadelphia, Pennsylvania."

because the notice or knowledge of an agent whose duty it is to transmit said notice or knowledge to the principal is imputed notice to the principal.

In 45 *C. J. S.*, Insurance, Section 692 reads as follows:

> "a. *In General*
>
> "The knowledge of an officer or agent of the company acquired within the scope of his duties, as to facts material to the insurance, is imputed to the company * * *."
>
> "The knowledge of an officer or agent of the company, which is acquired within the scope of his duties

of employment as to facts material to the insurance, is imputed to the company. This is true even though he does not in fact communicate his knowledge to the company or gives it erroneous information; * * *."

In *Couch, Cyclopedia of Insurance Law,* Vol. 2, Section 525, page 1548, we find the following language:

"* * * So, it is said that an agent, acquiring knowledge which might affect the liability of the insurer while acting in a matter in which he is required or authorized to act, is presumed to communicate such fact or knowledge to the insurer, whether he actually does so or not, and, consequently, that the knowledge of the agent is the knowledge of the insurer. * * *"

And in Section 1560 of the same treatise, on pp. 5530-31, we find the following language:

"* * * In any event, whether or not the insurer has waived the provision, or estopped itself from setting up noncompliance therewith, must depend upon the circumstances of the particular case. And the courts, as a general rule, will construe this provision against the insurer, and will not scan very closely evidence introduced by the insured tending to rebut a technical forfeiture, the rule being that slight evidence is sufficient for the purpose of establishing a waiver; also, that all relevant evidence should be admitted which tends to establish a waiver of proofs, when that point is in issue. But, while slight evidence is sufficient to establish waiver, the acts relied upon must have been such as can be reasonably calculated to have led insured to believe that further acts on his part were unnecessary. As a matter of fact, the general rule seems to be that any act or series of acts upon the part of the insurer, or its authorized agents, which tends to create a belief in the mind of the claimant under the policy that notice need not be given, or that proofs of loss will be unnecessary, will operate as a waiver and release the claimant from any contract obligation to comply with the provision. * * *"

The rule whereby notice to an insurance agent is imputed to his principal is discussed in *Myers v. John Han-*

cock Mutual Life Insurance Co., 108 O. S. 175. This case is of interest to us in that it sets forth the general rule applicable in an insurance case where knowledge to an agent may be imputed to the principal. The opinion states the general rule of agency which is applicable to our problem on pages 182 and 183, as follows:

> "The further pertinent statement upon this proposition is made in 2 Mechem on Agency (2d Ed.), Section 1834:
>
> " 'If the theory upon which notice is to be imputed be the legal identity of the principal with the agent, then the person to whom the notice comes must be such a person and acting in such a capacity that it may fairly be said that, for the time being, he is the principal. If the true theory be that the agent owes a duty to communicate, then the person to whom the notice comes must be such a one and acting in such a capacity that it may fairly be said that the principal looks to him for information concerning the subject-matter; that he is the person to whom information is likely to come, and whose duty it would be to communicate it.' "

It seems to us that Mr. Treacy, his employment, authority and duties to the Petitioner, come directly within the above statement.

When Mr. Estabrook on May 5 gave notice of the injury to the horse to Mr. Treacy, Mr. Treacy did not tell Mr. Estabrook that his notice was not sufficient, nor did he tell Mr. Estabrook that the notice of the injury to the horse should be made to the Home Office immediately, nor did he tell Mr. Estabrook that the name of the veterinarian was necessary in order that the notice be in compliance with the provisions of the insurance policy. But Mr. Treacy, the authorized agent of the insurance company, whose duty it was to receive such a notice and whose further duty it was to transmit such notice to the Home Office, accepted the notice given on May 5 without any qualifications and accepted said notice as sufficient notice as required by the

policy. This same thing happened again on May 15 when Mr. Treacy accepted a further notice from Mr. Estabrook in regard to the then present condition of the horse. If Mr. Treacy had said to Mr. Estabrook on May 5 and/or on May 15, "Your notice is not in compliance with the conditions of the policy but you must give a written notice by letter or by telegram addressed to the Home Office and give the name of the attending veterinarian," then, of course, Mr. Estabrook would have complied with the instructions and advice of Mr. Treacy and would have given said notice. But Mr. Estabrook and Mr. Howe were lulled to sleep by Mr. Treacy's having accepted the notice as sufficient notice and made no attempt to give any further notice in regard to the injury to the horse.

But the facts of the case do not stop here. Mr. Estabrook testified that he was told by the agents and officers of the Petitioner at the Home Office in Philadelphia in October that Mr. Treacy had transmitted to them the notice of the injury to the horse. There is no testimony that the Home Office, after receiving such information from its authorized agent, Mr. Treacy, notified either Mr. Howe or Mr. Estabrook that the notice must be in writing and must state the name of the attending veterinarian and other things that are now claimed by the Petitioner should have been done by the owner when he gave the notice. Again, when notice on July 7 was given to Mr. Treacy by Mr. Estabrook and Mr. Howe that the horse had died on June 27, did Mr. Treacy tell them that they had failed to comply with the provision of the policy in regard to giving notice of the injury to the horse? Mr. Treacy did not tell them on July 7 that they had failed to give any notice of an injury to the horse. On July 7 Mr. Treacy did not tell them that as the horse had died on June 27, their notice of the death of the horse was too late. The notice of the death of the horse was transmitted to the Home Office on July 8. The Home Office did not inform Mr. Howe or Mr. Estabrook

that they had not received any notice of the injury to the horse when it was first injured, nor did the Home Office inform the owner that giving notice of the death of the horse on July 7 when the horse died on June 22 was too late.

In the case of *National Live Stock Ins. Co. v. Henderson*, 164 S. W. 852 (Court of Civil Appeals of Texas, 1914), the notice requirement in the live stock policy is similar to the one under consideration in the present case. The notice was given or forwarded to the local agent and he in turn forwarded it to the insurance company. The syllabus relative to these facts reads as follows:

> "1. Where an animal insurance policy provided for notice forthwith by registered mail or telegraph to the main office of the insurer in case of illness or accident to the animal insured, a notice to the insurer's local agent was sufficient; it appearing that the same was immediately forwarded to and received by the insurer."

The notice that was given by Mr. Estabrook to Mr. Treacy was transmitted immediately by Mr. Treacy to the Home Office, as testified to by Mr. Estabrook. From the verdict of the jury we can state that the jury found that the notice of the injury to the horse given by Mr. Estabrook to Mr. Treacy on the 5th day of May was immediately transmitted by Mr. Treacy to the home office and therefore the facts in our case come within the law as stated in the above named case.

In the case of *Dwelling-House Insurance Co. v. Gould*, 19 Atl. 793 (Supreme Court of Pennsylvania), the proposition of whether the insured gave sufficient notice and proof of loss under the terms of a fire insurance policy was considered and the opinion finds the result of decisions in reference to such notice and proof of loss as follows on page 795:

> "• • • The result of the decisions may therefore be formulated in the following rule: If the insured, in

> good faith and within the stipulated time, does what he plainly intends as a compliance with the requirements of his policy, good faith equally requires that the company shall promptly notify him of their objections, so as to give him the opportunity to obviate them; and mere silence may so mislead him to his disadvantage, to suppose the company satisfied, as to be of itself sufficient evidence of waiver by estoppel. * * *"

There is no question that Mr. Howe intended as a compliance with the requirements of his policy to give notice of the injury to his horse and there is no question that Mr. Estabrook, when he gave the notice to Mr. Treacy, intended in good faith to meet with the requirements of the policy. Good faith upon the part of the company demanded that either Mr. Treacy or the Home Office notify Mr. Howe or Mr. Estabrook of their objections and thus give Mr. Howe the opportunity to obviate these objections.

In the case of *William Zoller Co. v. Hartford Fire Ins. Co.*, 116 Atl. 359 (Supreme Court of Pennsylvania), on page 361 the rule of law above quoted from the case of *Dwelling-House Ins. Co. v. Gould* was quoted and approved.

Under the law of the State of Ohio, the insurance company received actual and sufficient notice of the injury and death of the insured horse, Menex.

CONCLUSION.

The District Court and the Court of Appeals did not depart from the applicable local law of Ohio as decided by the Supreme Court of Ohio. Said Courts followed the general law of this country and the law of Ohio as set forth in 2 *Mechem on Agency* (2nd Ed.), Section 1834. The Supreme Court of Ohio in the case of *Myers v. John Hancock Life Insurance Company*, 108 Ohio State Reports 175 has stated and declared that said statement in *Mechem on Agency* is the correct law of Ohio.

The respondent was entitled to the benefit of the jury's verdict on the issues of fact and was entitled to the instructions on the question of law given by the trial judge to the jury as the trial judge gave the applicable law of Ohio to the jury.

The sole issue in the case was whether or not the notice given by the respondent in regard to the injuries to the horse came within the purview of the contract of insurance and the law of Ohio. This was a mixed question of law and fact which was decided in favor of the respondent.

We hereby respectfully submit that the petitioner was duly notified and knew of the injuries to and the death of the horse.

Wherefore, respondent respectfully prays this Honorable Court to deny the issuance of a Writ of Certiorari.

April 20, 1950.

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Of Counsel.